e-MANTSHI

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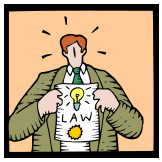
Welcome to the eighty fourth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

The Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act, 2012 Act 20 of 2012 was published on 19 December 2012 in Government Gazette no 36021.The amended section reads as follows:

1. Amendment of section 1 of Act 28 of 2005, as amended by section 1 of Act 8 of 2006, section 1 of Act 13 of 2007, section 1 of Act 7 of 2008, section 1 of Act 20 of 2009 and section 1 of Act 20 of 2010.—Section 1 of the Repeal of the Black Administration Act and Amendment of Certain Laws Act, 2005, is hereby amended by the substitution for subsection (3) of the following subsection:

"(3) Sections 12(1), (2), (3), (4) and (6) and 20(1), (2), (3), (4), (5), (6) and (9) and the Third Schedule of the Act are hereby repealed on such date as national legislation to further regulate the matters dealt with in sections 12(1), (2), (3), (4) and (6) and 20(1), (2), (3), (4), (5), (6) and (9) and the Third Schedule of the Act is implemented ".

2. The Criminal Law (Forensic Procedures) Amendment Act, 2010 (Act No. 6 of 2010) came into operation on 18 January 2012. A notice in this regard was published in Government Gazette no 36080 dated 18 January 2012.

The purpose of the Act is to amend the Criminal Procedure Act, 1977, so as to provide for the compulsory taking of fingerprints of certain categories of persons; to provide for the taking of fingerprints and body-prints for investigative purposes; to further provide for the retention of fingerprints and body-prints taken under the Act; to further regulate the destruction of fingerprints taken under the Act; to further regulate proof of certain facts by affidavit or certificate; to amend the South African Police Service Act, 1995, so as to regulate the storing and use of fingerprints, body-prints and photographic images of certain categories of persons; to provide for the keeping of databases and to allow for comparative searches against those databases; to provide for security measures relating to the integrity of information stored on these databases; to make provision for the development of standing operating procedures regarding access to the databases of other state departments; to amend the Firearms Control Act, 2000, so as to further regulate the powers in respect of fingerprints and body-prints for investigation purposes; to amend the Explosives Act, 2003, so as to further regulate the powers in respect of fingerprints and body-prints for investigation purposes; and to provide for matters connected therewith.

3. The Minister of Justice has determined amounts for purposes of certain provisions of the Criminal procedure Act 51 of 1977.These determinations were published in Government Gazette 36111 dated 30 January 2013.The determinations are as follows:

I, Jeffrey Thamsanqa Radebe, Minister of Justice and Constitutional Development, acting under sections 9(1)*(a)*, 56(1), 57(1)*(a)* and (5)*(b)*, 57A(1), 112(1)*(a)* and *(b)*, 300(1)*(a)* and 302(1)*(a)*(ii) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), hereby —

(a) determine, for the purposes of the sections of the said Act mentioned in Column 1 of the Schedule, the amounts mentioned opposite thereto in Column 2 of the Schedule; and

(b) repeal Government Notice No. R. 239 of 14 February 2003, with effect from 1 February 2013.

Schedule

Column 1 **Section of the Act**		**Column 2** **Amount determined**
(a)	Section 9(1*)(a)*	R2 500
(b)	Section 56(1)	R5 000

(c)	Section 57(1*)(a)* and *(5)(b)*	R10 000
(d)	Section 57A(1)	R10 000
(e)	Section 112(1*)(a)* and *(b)*	R5 000
(f)	Section 300(1)(a)	R1 000 000 in respect of a regional court, and R300 000 in respect of a magistrate's court
(g)	Section 302(1)(a)(ii)	R6 000 in the case of a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years; and R12 000 in the case of a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer

4. The Minister of Justice has also determined an amount in terms of section 92(1) (b) of the Magistrates' Courts Act, 1944. The notice to this effect was also published in Government Gazette no 36111 dated 30 January 2013.It reads as follows:
I, Jeffrey Thamsanqa Radebe, Minister of Justice and Constitutional Development, acting under section 92(1)*(b)* of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), hereby, with effect from 1 February 2013, amend the Schedule to Government Notice No. R.1411 of 30 October 1998, by the substitution in Column 2 of the Schedule for the words "R60 000 where the court is not the court of a regional division, and R300 000 where the court is the court of a regional division" of the words "R120 000 where the court is not the court of a regional division, and R600 000 where the court is the court of a regional division".

Recent Court Cases

1. S v PARSONS 2013 (1) SACR 38 (WCC)

The written notice to appear in court (in terms of section 56 of Act 51 of 1977) should contain a warning that if the person it is issued to pays the admission of guilt, it translates into a conviction

The Accused against whom a complaint of 'disturbing the peace' was brought was persuaded to pay a fine (an admission of guilt fine) by a Police Officer to whom the complaint had been entrusted for investigation. According to the Summons and/or Notice to appear, the accused was scheduled to appear before Court on 29 July 2011 but prior to that date he was convinced by an investigating officer to rather pay an admission of guilt fine. The Accused's Affidavit which accompanies the request to review this matter says the following:

"I was issued with the fine but never was it explained to me that I would receive a criminal record. Had this been said to me I would never have paid the fine and would definitely have appeared on the 29 July 20

….....the documents was in Afrikaans and when I told the chap that I wanted it in English, he said that he would translate in English for me. "

Nowhere in the written notice to appear is there a warning that payment of the stipulated admission of guilt fine translates to a conviction. This is not fair to unsuspecting members of the public. This form needs improvements because as it stands it may not pass Constitutional muster. It cannot be left to the police officer serving an accused person with the written notice to appear to also explain to such an accused person that *"look upon payment of this admission of guilt fine you shall be deemed (for legal purposes) to have been duly convicted and an entry shall be made correspondingly in the SAP69. "* The form came into existence prior to the present constitutional era. At that time no emphasis was placed on the rights of an accused person at all. The correct procedure is that the police officer must warn the accused about the conviction record. An endeavour must also be made by the powers that be to include this warning on the prescribed Notice to Appear which is handed to an accused person.

2. DAFFY v DAFFY 2013(1) SACR 42 (SCA)

For a "domestic relationship" in terms of the Domestic Violence Act 116 of 1998 something more than mere sibling relationship is required in the case of adult brothers who lived in separate households.

The appellant and respondent are brothers whose relationship broke down over the running of a business. The respondent applied to a magistrates' court under the Domestic Violence Act 116 of 1998 for an interim protection order against the appellant. The appellant opposed the confirmation of the interim order and after hearing evidence the magistrate decided that the respondent had failed to make out a case for the relief sought, and set aside the interim order. The respondent appealed to the high court which upheld the appeal and confirmed the protection order. On appeal, the appellant contended that the respondent had misconstrued his

remedy and that the dispute between them was really of a commercial nature and not a matter of domestic violence that ought to have been dealt with under the Act. The respondent relied upon the wording of subpara *(d)* of the definition of 'domestic relationship' in s 1 of the Act *((d)* they are family members related by consanguinity, affinity or adoption), together with the fact that he and the appellant were brothers, in order to qualify him as a 'complainant' as envisaged by the Act.

Held, that the subparagraph could hardly have been more broadly formulated. No degree of relationship, consanguineous or otherwise, was mentioned; and the concept of 'family' was in itself extremely wide. The legislature could not have envisaged that distant cousins, having nothing in common save for an ancient mutual ancestor, were for that reason alone to be regarded as having a domestic relationship. (Paragraph [7] at *45h.)*

Held, further, that, bearing in mind their respective ages and the fact that they had not shared a common household for many years, it would be absurd to conclude that the mere fact that the parties were siblings meant that they shared a domestic relationship as envisaged by the Act. For this reason alone the respondent failed to show that he was a 'complainant' entitled to the protection of the Act. (Paragraph [9] at *46e-f)*

Held, further, that, on the evidence, none of the appellant's past actions, either alone or cumulatively, justified a finding that the appellant had harmed or was threatening to harm the respondent's health, safety or wellbeing. (Paragraph [16] at *48c-d.)*

3. S V ROSS 2013 (1) SACR 77 WCC

If the state has mistakenly relied on a certificate in terms of section 212(4) of Act 51 of 1977 rather than an affidavit or oral evidence an application for the reopening of its case will not be granted on appeal.

In an appeal against a conviction for an alcohol-related driving offence it appeared that the state had relied on a certificate by a forensic analyst in terms of s 212(4) of the Criminal Procedure Act 51 of 1977 to prove, not only that a sample of blood contained a certain quantity of alcohol, but also the equipment used for the test was correctly calibrated. Conceding that there was no proof before the court that the items of test equipment had been properly calibrated, and since s 212(4) did not provide for that aspect to be proven by a certificate and had to be proven by way of an affidavit or oral evidence, the state requested the court to set aside the conviction, but refer the matter back to the magistrates' court so that the error could be rectified.

The court was prepared to accept that there was a prima facie likelihood that the evidence sought to be led was true and that it was materially relevant to the outcome of the trial, but the central issue was whether the state had advanced a reasonably sufficient explanation why the evidence in question was not led at the trial. The state's explanation that it was misled into believing this was not in issue, or was lulled into a false sense of security by the appellant, was not borne out by the facts and was inadequate. **In** truth, the evidence was not led because the state was mistakenly of the view that it had, through the analyst's certificate, proved, at least on a. prima facie basis, the accuracy of the two instruments involved in the blood specimen analysis. No explanation had been proffered as to why it believed that it was entitled to do so by means of a certificate, notwithstanding the provisions of s 212(10), which required the use of an affidavit. In these circumstances the state's explanation was not reasonably sufficient to order the taking of further evidence in the magistrates' court. The appeal was accordingly upheld. (Paragraph [20] at 8*2h-i.)*

4. S V KHUMALO 2013(1) SACR 96 KZP

The state is bound by facts stated in a section 112(2) Act 51 of 1977 statement if it accepts the plea.

The appellant pleaded guilty in a trial in the high court to a charge of murdering her husband. She made a statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 in which she admitted the elements of the offence and alleged further: 'The deceased subjected me to abuse and financial neglect. As a result I became depressed and desperate.' She went on to admit that she had hired a man to shoot her husband. The state made no objection to the plea and the appellant's legal representative addressed the court in mitigation of sentence. The presiding judge stressed the need for the appellant to testify and signaled to her that the evidence adduced in her statement, together with the address in mitigation, was insufficient to allow her to escape a sentence of life imprisonment. The appellant then testified and her evidence clearly did not impress the presiding judge, as the judge *a* commented that her claim of abuse was not very convincing or substantial and that what she had to endure was 'not different from what most women in this country have to endure'. The court then imposed a sentence of life imprisonment. On appeal against this decision the court considered whether the state was bound by the s 112(2) statement and whether the presiding judge was entitled to reject the appellant's submissions made by her legal representative.

Held, that, having accepted the appellant's plea, the state was bound by the fact that, as a result of the conduct of her husband, she had become depressed and desperate. (Paragraph [17] at *100h.)*

Held, further, that, although the court a quo was entitled to indicate that it did not accept the further submissions from the bar, a substantial and compelling circumstance had already been disclosed in the appellant's s 112 statement. Consequently, its final analysis of all the evidence was flawed: the evidence led by the appellant did not contradict her s 112 statement. Albeit that the cross-examination of the appellant by the prosecutor may have revealed other aggravating circumstances relating to the commission of the crime, the fact that the conduct of the deceased had made her depressed *d* and desperate constituted a compelling and substantial circumstance, entitling a court not to impose the prescribed sentence. The appeal was upheld and the sentence was reduced to one of 20 years' imprisonment. (Paragraph [18] at *100h-l0la* and [19] at *10I b.)*

From The Legal Journals

Schulze, W G

“Internetbedrog: diefstal van geld uit ’n bankrekening”

TSAR 2012 827

Wallis, M

“Judges: servants of justice or civil servants?”

SALJ 2012 652

Muller, M A

“Handling uncertainty in a court of law”

Stellenbosch Law Review 2012 370

Du Plessis, E

"Judicial oversight for sales in execution of residential property and the National Credit Act"

De Jure 2012 532

Whitear-Nel, N

" S v Matyityi 2011 1 SACR 40 SCA"

De Jure 2012 586

Van der Bijl, C

"Criminal liability and policy considerations in the context of high speed pursuits"

De Jure 2012 439

Hulme, D & Pete, S

"Houston, we have a problem! Gaps, glitches and gremlins in recent amendments to the law of civil procedure pertaining to the magistrates' courts"

De Jure 2012 359

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

The criminal prosecution and sentencing of maintenance defaulters

There is a culture of non-payment of maintenance in South Africa. The non-payment of maintenance is not only a contravention of statutory provisions; it is also a

constitutional issue, engendered in nature, as it is mostly the women and the children who suffer. Mokgoro J of the Constitutional Court noted:

> 'Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The Judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law.' (Bannatyne v Bannatyne 2003 2 SA 363 (CC) para 27)

This court confirmed that the state is bound to provide an effective legal framework, as an ineffectual system weakens the attainment of gender equality. It affects the dignity and equality of women and does not protect the children as required by the Constitution (para 29). This duty to successfully maintain children is not only a constitutional imperative, it is also in line with the international duty of the state as a signatory of the Convention on the Rights of the Child.

South Africa already has a useful legislative framework for the recovery of maintenance dues, that contains both civil and criminal remedies. The civil remedies are ignored for current purposes as the focus is on the provisions relating to the criminal prosecution of able, but wilful and disobedient maintenance defaulters. Although these provisions are also aimed at encouraging maintenance debtors to honour their responsibilities, the implementation should also serve as a deterrent against the non-payment of maintenance. The sentencing of maintenance defaulters is particularly problematic in practice, as the possible punishment of the offender must be weighed against the rights of the maintenance dependants, especially children. The courts should not prejudice the children involved by sending the defaulter to prison, as the resulting unemployment would kill the proverbial goose that lays the golden eggs, and thus defeat the very purpose of the maintenance legislation. However, ineffective sentencing practices create the impression of a 'toothless' system, which implies that court orders can be ignored at will, and without any consequences.

There are three possible bases for the criminal prosecution of maintenance defaulters.

- The criminal offence for the failure to maintain one's children where no preceding court order is required - in instances where there is a duty and an ability to provide for the children – is in section 305(4) of the Children's Act 38

of 2005. The elements of the current crime are: legal liability for the child; failure to provide; means or ability to maintain; and *mens rea* in the form of either intent or negligence. The onus currently rests on the state to prove all the elements of the crime. Criminal prosecution under this statute is not dependent on an existing court order, although such an order will not prevent prosecution of the offender. The sentencing options include a fine and long terms of imprisonment. There have been no reported cases on this section.

- The criminal prosecution for the failure to pay maintenance in terms of a court order, is found in section 31(1) of the Maintenance Act 99 of 1998. There are four elements to this offence (*S v Magagule* 2001 (2) SACR 123 (T) para 105): the maintenance order directing the accused to make maintenance payments; failure of the accused to comply with the order; the means to comply with the order at the time of the failure; and a guilty mind in the form of either intention or negligence. The onus to prove all these elements rests on with the state. The most common defence in the prosecution, under s 31(1), is a lack of means that is not a result of unwillingness to work or misconduct. It is not the only defence. In the assessment of the recent judgments, it was noted that a large percentage of convictions were overturned as a result of procedural irregularities resulting in an unfair trial - mainly because the court did not inform the unrepresented accused of his rights as set out in *S v Magagule.* Once convicted, the court can make an order for the recovery of arrear maintenance plus interest, either instead of the sentence, or in addition to it. The statute also makes provision for a fine and imprisonment as sentencing options.

- The common law crime of contempt of court, in the form of failure to comply with a court order, is also applicable to maintenance defaulters and is 'a recognised method of putting pressure on a maintenance defaulter to comply with his/her obligation' *(Bannatyne v Bannatyne* para 20). The Constitutional Court added a novel possibility for 'recalcitrant maintenance defaulters who use legal process to side-step their obligations towards their children in the maintenance courts' (para 32). In instances where 'good and sufficient circumstances' exist, the high court may be approached for a contempt of court order, where an order of a lower court has been ignored (para 23). The elements of the crime include: an existing and valid court order; the order must have come to the attention of the defaulter; the defaulter must have been able to comply with the order; the defaulter must have disobeyed the order; and the non-adherence or disobedience must have been wilful.

Sentencing an accused for contempt of court can include any of the sentencing options, including imprisonment.

With these offences available, two questions spring to mind. Why do so many maintenance defaulters not support their children in contravention of the legislation? And secondly, how effective are the courts in dealing with these maintenance defaulters.

It is common cause that there is a culture of non-payment by many maintenance debtors. The reasons for the default on maintenance payments are varied, and include a lack of means. Research, however, shows that the reasons include attitudinal and other problems: the lack of family structure and high divorce rates (S Burman and S Berger (1988) 4 *SAJHR* 194-206 at 194). Khunou argues that this loosening of the family bonds has resulted in a decline of family support, as many absent fathers do not take responsibility for their children. In addition, some view the non-payment of maintenance as a form of punishment of women, and where the maintenance defaulter has moved on to another relationship, he often prioritises his new families' personal needs above those of a previous relationship (G Khunou ' (2012) 43(1) *South African Review of Sociology* 4). Khunou argues that an underlying factor in the maintenance courts, is the shift in power away from the man, as he experiences the court proceedings as a threat to his authority (at 10). Men, especially African men, she notes, regard the use of maintenance courts to enforce maintenance obligations in a negative light; women are considered to be disrespectful, as it gives them control over their money without the corresponding social rights they may previously have had over the women and the children (G Khunou in Budlender and Moyo (eds) *What about the Children? The silent voices in maintenance* (2004) 79-80). Men often feel that maintenance problems should be discussed by the elders, and that they should find a solution that will not embarrass any of the parties (at 80). Khunou further states that:

> 'By awarding maintenance money to mothers, the maintenance system unintentionally challenges widely held views on gender relations, parenting and money. It also alters the relationship dynamics between women, men and their money.' (at 11)

From a legal perspective, however, these arguments are not relevant, as the law is not concerned with the relationship between the parents, but is focused rather on the interests of the children, and specifically their maintenance needs. It is submitted that the attitudes discussed above make it even more important to promote the effective enforcement of maintenance obligations such that children are maintained in light of the constitutional imperatives, whatever the underlining socio-gender attitudes.

How do the courts deal with these willful defaulters? In sentencing an offender, the courts have an array of sentencing options: a fine, direct or periodical imprisonment or correctional supervision, and sentences can be suspended or postponed.

Presiding officers understand that effective sentencing of offenders serves a dual purpose: punishing the guilty and deterring other possible offenders.

The sentencing of maintenance defaulters, however, is more problematic, as the court has to balance the need for punishment and deterrence, with additional constitutional imperatives. The aim of sentencing a maintenance defaulter is slightly different, as it is to enforce the order and not to punish the offender for the sake of punishment (*S v Permidie* 2001 JDR 0123 (C) at 3). So, although the statutes make provision for fines and/or imprisonment, these options are seldom used - and often for good reason.

A sentence of a fine would in most maintenance instances be inappropriate. A large number of maintenance defaulters are impoverished, and the money that is available should rather be used towards the maintenance of the children. The sentencing of a maintenance defaulter to direct imprisonment is also problematic, as the courts do not want to prejudice the children by causing unemployment of the father. The courts, in consideration of the rights and interests of the children, usually, as a result, impose a suspended sentence on maintenance defaulters. It is submitted that this is appropriate in the case of first offenders.

For obstinate, repeat offenders, suspended sentences are, however, ineffective, and although direct imprisonment could be imposed in the case of such defaulters as an 'appropriate constitutional relief for the enforcement of a claim for the maintenance of children' (*Bannatyne v Bannatyne* para 20-23), direct imprisonment is hardly ever ordered in practice - even for these offenders. It has been noted that 'sometimes they [the courts] suspend the sentence three or four times, so people think nothing of a suspended sentence. The enforcement system is therefore unable to function effectively as a deterrent' (Burman and Berger 205). This is particularly problematic with those maintenance defaulters that will only pay maintenance if and when their liberty is possibly at stake. There is a need for harsher punishment for the recalcitrant.

It is submitted that this culture in the courts is one of the reasons why the maintenance-enforcement system is seen to be ineffective, and in the case of these offenders the courts fail to have regard for the parlous circumstances of the claimant. The lamenting of the SALC in 1997, that the courts developed a tradition of 'routinely suspending sentences for the failure to comply with maintenance orders, whether the sentence is one of a fine or of a term of imprisonment' remains unchanged. In the 63 latest judgments based on prosecutions in terms of s 31(1) of the Maintenance Act, not one instance exists where the sentence was not suspended - either by the magistrate in the court *a quo,* or by the high court on review. The consequence of this approach is that maintenance defaulters are aware

that the chances of actual imprisonment are slim, and as such the criminal sanction no longer has a deterrent effect.

It is considered that the culture of suspension of sentences by the courts in these cases is not only regrettable, but also unconstitutional, as it does not fulfill the constitutional 'best interests of the child', as well as gender imperative. It keeps the threat of an effective criminal sanction hollow and ineffective. This state of affairs is especially unsatisfactory, since there are two more effective alternatives that could be effective against recalcitrant defaulters that seemingly have to see the prison steps and hear the clanging of the prison gates, before they pay their dues: periodical imprisonment (endorsed by the SCA in *Visser v S* [2003] JOL 12204 (SCA) and correctional supervision. The advantages are obvious: it is less costly, the family life and employment of the offender are not disrupted, and the community benefits from the free community services.

It is incomprehensible why these two existing sentencing options are ignored by the courts, when sentencing maintenance defaulters. It is recommended that the maintenance prosecutors and presiding officers are re-trained to these more nuanced sentencing options. They could be used as an effective tool against recalcitrant maintenance defaulters who disregard orders of court - without prejudicing the children.

Prof. Marita Carnelley
School of Law
University Of Kwazulu-Natal Pietermaritzburg

The following advertisement has been received:

LLM (Criminal Justice)
School of Law
University of KwaZulu-Natal
Part-time Programme
One subject per semester plus mini-dissertation in second year
Block release: 1 week per semester contact time
Deadline: 15 February 2013
Contact: Prof SV Hoctor: hoctors@ukzn.ac.za
Nonhlanhla Mbhele: mbhelenj@ukzn.ac.za

Matters of Interest to Magistrates

Judicial transformation: South Africa's appalling non-commitment

Pierre de Vos on 22 January 2013 in The Daily Maverick

When the Judicial Service Commission (JSC) interviews candidates for appointment to various courts, many of its members seem to be passionate about its mandate to promote transformation within the judiciary. But this appears to be a rather narrow and stunted passion, often focusing on the replacement of old guard (white) patriarchs, with new order (white and black) patriarchs. Changing the racial aesthetics of the judiciary (within limits) often seems to take precedence over the need to change the prevalent legal culture, a culture which allowed most Apartheid-era judges to claim that their job was merely to apply the law – no matter how unjust, racist or oppressive – in a "neutral", "objective" and "impartial" manner. The way in which the JSC is currently dealing with the filling of a vacancy on the Constitutional Court does nothing to challenge this impression.

The Constitutional Court is an important institution with immense powers. It can declare invalid Acts passed by the democratically elected Parliament. It can also nullify the unlawful or unconstitutional actions performed by the president. The judges are not elected. They earn their legitimacy and authority from the cogency, dynamism and logic of their judgments as well as their ability to marry a certain pragmatic respect for the separation of powers doctrine with a willingness to make principled decisions not swayed by the political pressures exerted on them by unscrupulous politicians and powerful business lobbyists. This is not an easy task, but it is made more difficult when more than 50% of the population is not adequately represented on the Court.

Currently, only two of the eleven judges on the Constitutional Court are women. For a while there were three women on the Court, but in our patriarchal society it is no surprise that this state of affairs did not last.

For the latest appointment the JSC shortlisted five candidates for interviews – all five of them male. The list is not particularly inspiring – except, perhaps, if one is a patriarchal traditionalist with strong views about the purity of the common law and the limited role judges should play in interpreting the Constitution and the law. If one believes that Constitutional Court judges have an important role to play in the promotion of a progressive, transformative vision of society through their

interpretation of the Constitution and their development of the common law and customary law, the shortlist of nominees may not look particularly inspiring.

Judges Selby Baqwa, Lebotsang Bosielo and Brian Spilg are all competent lawyers, but none of these judges have (as far as I can tell) demonstrated any progressive streak or deep insight into the ways in which our legal culture could and should be transformed. Advocates Jeremy Gauntlett and Mbuyiseli Madlanga are both good advocates, but I suspect they suffer from the same deficit as the nominated judges: a lack of legal imagination and daring and a lack of enthusiasm for the transformation of the legal system.

Surely we should appoint more judges who will use their considerable legal skills to develop and mould the common law and customary law legal rules to ensure that these rules do not disproportionately benefit the powerful and the well-connected inside government, in big business and within the traditional leadership structures? Can we really say that a legal system is fair when most people cannot afford to employ the services of even a mediocre lawyer and when most judges do not subject legal rules to sustained ideological questioning, even when these rules often tend to benefit those who can afford to pay R20 million for a Buffalo or for the services of a team of highly paid advocates? And how many of the shortlisted candidates have a deep commitment to feminism and insight into the manner in which seemingly neutral legal rules often promote the interests of men (and male domination) in our society?

Sadly, I am not sure that either the JSC or President Jacob Zuma will take into account such issues during the appointments process. The Constitution prescribes a different process for the appointment of Constitutional Court judges to that used for the appointment of other High Court or Supreme Court of Appeal (SCA) judges. The JSC has the final say on the appointment of ordinary judges. But when a vacancy occurs on the Constitutional Court, the JSC must conduct interviews and then prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the president. When there is one vacancy – as there is now – the JSC must therefore submit a list of four names to the president. The president can then appoint one of the four candidates nominated by the JSC after consulting the Chief Justice and the leaders of parties represented in the National Assembly.

During the previous round of appointments, the list of four names included one excellent woman candidate. However, President Zuma appointed a (legally) more conservative male above a (legally) more progressive woman candidate. Not that this came as a surprise: the president was merely exercising his political discretion in accordance with his own ideological disposition, choosing a male judge that would not push for radical legal transformation above a female judge who might have been slightly more progressive.

I am, of course, not arguing that women candidates for appointment to the judiciary will always be more progressive or more prepared to pursue a vigorous transformative agenda than male judges. Just as Margaret Thatcher showed that a woman prime minister could be even more reactionary and bigoted than her male contemporaries, so the extra curial writing of judge Carol Lewis have demonstrated that a female judge on the SCA will not necessarily be more enthusiastic about judicial transformation (in either the narrow or broader sense) than her male counterparts.

There are two issues at stake here. The first is about the constitutional injunction that when making judicial appointments the need for the judiciary broadly to reflect the racial and gender composition of South Africa should be taken into account. A failure to take heed of the disproportionately small number of women judges on the Constitutional Court would suggest that – for reasons of retaining patriarchal dominance and privilege – this constitutional injunction is only respected as far as race is concerned. Although the president has the final say on who gets appointed to the Constitutional Court, voters – including all of us who take gender equality seriously – have a right and a duty to criticise the president if he fails to take heed of the imperative of gender transformation on the bench. The second issue relates to the need to appoint judges (male and female, white and black), who are passionate about transforming the legal system to make it more just and equitable, and less in service of the rich and the powerful men in our society.

Given the fact that all five candidates to be interviewed for the one vacancy on the Constitutional Court (left by the departure of Justice Zak Yacoob) are men, the JSC will send a list of four male nominees to the president to choose from. The president is, of course, not obliged to appoint anyone from this list of four names. He can advise the JSC that some of the nominees are not acceptable and provide excellent and justified reasons for this view, after which the JSC will have to supplement the list.

This means President Zuma can tell the JSC that, given the requirement contained in section 174(2) that the “need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed”, the absence of any women on the list is unacceptable. If he did this, the JSC would then have to produce more names that include those of appointable women candidates, of which there are several. But I am not holding my breath.

Of course, why the JSC decided not to re-advertise the Constitutional Court vacancy when it saw that no credible women candidates were nominated, tells another story about the JSC’s lack of commitment to real judicial transformation. **DM**

A Last Thought

"To achieve competence in the practice of law one must, of course, master a considerable body of doctrine and be familiar with the distinctive forms of argument the law employs. The truly distinguished lawyer, however, the one who is recognized by his or her peers in the profession as an exemplary practitioner and whose work is marked by subtlety and imagination, possesses more than mere doctrinal knowledge and argumentative skill. What sets such a lawyer apart and makes him a model for the profession as a whole is not how much law he [or she] knows or how cleverly he [or she] speaks, but how wisely he [or she] makes the judgments that his [or her] professional task requires. When one lawyer wishes to praise the work of another, the compliment he is most likely to pay him is to say that he is a person of sound judgment. Nothing counts more among practicing lawyers than this."

Kronman, A. 1987. Living in the law. *The University of Chicago Law Review* 54(3): 861-862.